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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. BI VAN VO, Defendant and Appellant.	H033997 (Santa Clara County Super. Ct. No. CC891044)

After defendant Bi Van Vo pleaded no contest to various drug-related offenses, he was sentenced to a term of six years in prison, in accordance with his plea agreement. At the sentencing hearing, the trial court also imposed a concurrent county jail sentence of 90 days on one of the charges, and on appeal, Vo contends this was improper since the trial court had previously dismissed the charge in question.

We disagree. Though a colorable argument can be made that the trial court made an oral pronouncement dismissing the charge in question, any such dismissal would be invalid since no reasons therefor were entered in an order on the minutes as required by Penal Code section 1385. We resolve the conflict between the reporter's transcript and the clerk's transcript and find that the court intended to amend the charge to a misdemeanor, not dismiss it. Thus the concurrent county jail sentence was proper, and we shall affirm the judgment.

I. FACTUAL[1] AND PROCEDURAL BACKGROUND

A. Vo's arrest and the evidence seized

On December 28, 2007, San Jose Police Officer Bret Moiseff went to Vo's residence to execute a search warrant, which authorized the search of Vo, Vo's wife, their residence, and a 2004 Toyota Highlander. Officer Moiseff observed Vo driving an Infiniti from the rear to the front of his residence, and then go inside. When Vo emerged a few minutes later and approached the Infiniti, Officer Moiseff, along with a second police officer, detained and searched Vo, discovering approximately $3,800 in cash. After Vo was given his *Miranda*[2] warnings, he consented to a search of the Infiniti, which revealed approximately 268 tablets of 3, 4-methylenedioxymethamphetamine (MDMA), or ecstasy, approximately 15 "small rocks" of cocaine base in small plastic baggies, and a number of empty plastic baggies.

In a search of the residence, Officer Moiseff found a digital scale, a bottle containing a liquid and labeled ketamine, a testing kit, more empty plastic baggies and empty plastic capsules. Vo informed the officer that he sold ecstasy in clubs in San Francisco, but that he did not own the cocaine base which had been found in the Infiniti.

B. The charges, change of plea hearing and sentencing

On July 18, 2008, the Santa Clara County District Attorney filed an information alleging that, on December 28, 2007, Vo committed the following five felony offenses: transportation of cocaine base (Health & Saf. Code, § 11352, subd. (a), count 1);[3] possession for sale of cocaine base (§ 11351.5, count 2); transportation of MDMA (§ 11379, subd. (a), count 3); possession for sale of MDMA (§ 11378, count 4); and

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[1] The facts are derived from the testimony at the preliminary examination and other documents contained in the record on appeal.

[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

[3] All further unspecified statutory references are to the Health and Safety Code.

possession of ketamine (§ 11377, subd. (a), count 5).[4] The information also alleged that Vo had been previously convicted of possession for sale of a controlled substance in violation of section 11351.5 (§§ 11370.2, 11370, subds. (a) & (c)).

On October 17, 2008, in accordance with a plea bargain, Vo entered a plea of no contest to all five counts and admitted the prior conviction allegation in exchange for the promise of a six year sentence. Prior to entering the plea, Vo's counsel noted that he had been advised that the prosecution intended to dismiss count 5 because ketamine was not on the "controlled substance chart." Defense counsel stated he was allowing Vo to plead no contest to that charge in anticipation of it being dismissed at sentencing. The trial court allowed this, advising Vo that if count 5 was not dismissed, his potential maximum sentence was nine years and eight months, but if it were, his potential maximum sentence would be nine years.

At the January 30, 2009 sentencing hearing, the trial court imposed a 16 month concurrent sentence on count 5. Defense counsel interjected, stating his belief that count 5 had been previously reduced by the court to a misdemeanor since, statutorily, possession of ketamine could not be a felony. At this point, the deputy district attorney (DDA) spoke up and the following exchange took place:

"[DDA]: Your Honor, that [i.e., the reduction of count 5 to a misdemeanor] wasn't previously done. [¶] The People move to amend at this time to a misdemeanor.

"THE COURT: Yeah, that was an issue I was looking for there.

"[DDA]: The People ask to dismiss at this time.

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[4] On August 26, 2008, in an opposition to Vo's motion to dismiss the charges for failure to produce the sealed portion of the search warrant affidavit, the People acknowledged that count 5 was improperly charged as a felony, and that "[t]he correct violation for Count 5, alleging possession of ketamine, is . . . section 11377[,] [subdivision] (b)(2)--a misdemeanor." However, the People did not seek to either dismiss count 5 or amend the information to reflect the proper charge until the sentencing hearing.

"THE COURT: Okay. [¶] And any objection?

"[DDA]: No, Your Honor.

"THE COURT: No, she made the motion. [¶] [Defense counsel], any objection?

"[DEFENSE COUNSEL]: No.

"THE COURT: Okay. And then that will be granted. [¶] And how would that change?

"[PROBATION OFFICER]: Just that that would strike Count 5 and it's [*sic*] 16 months concurrent term from the prison chart.

"THE COURT: Okay."

Following a brief discussion of how the restitution fine would also be changed from $3,600 to $2,400, the probation officer advised the trial court, "we're going to be asking for a County jail term to run concurrent with respect to Count 5." The trial court responded, "Okay Count 5, and we'll have a county jail sentence imposed of 90 days. That will run concurrent with the same credits."

The first page of the minute order from the sentencing hearing indicates that count 5 was amended to a misdemeanor, though it again erroneously references subdivision (a) of section 11377.[5] An attachment page to the minute order, however, lists count 5 as a felony, but indicates that a concurrent sentence of 90 days in county jail was imposed on that charge.

Vo timely appealed.

II. DISCUSSION

A. Certificate of probable cause

The People contend that Vo is precluded from seeking relief on appeal as he failed to obtain a certificate of probable cause from the trial court pursuant to Penal Code

[5] See footnote 4, *ante*.

section 1237.5.[6] According to Vo, his claim is exempt from this requirement because he is not challenging the validity of his plea, but rather is raising an issue regarding his sentencing pursuant to his plea bargain in which the parties contemplated the dismissal, rather than the amendment, of count 5.

Under California Rules of Court, rule 8.304(b)(4)(A) and (b)(4)(B), which implements Penal Code section 1237.5's requirement of a certificate of probable cause, the defendant need not seek such a certificate "if the notice of appeal states that the appeal is based on: [¶] (A) The denial of a motion to suppress evidence under Penal Code section 1538.5; or [¶] (B) Grounds that arose after entry of the plea and do not affect the plea's validity."

When a guilty or no contest plea is part of a plea bargain, whether a certificate of probable cause is required to challenge the sentence on appeal depends on whether or not the defendant is actually challenging the plea bargain itself. " '[T]he critical inquiry is whether a challenge to the sentence is *in substance* a challenge to the validity of the plea, thus rendering the appeal subject to the requirements of section 1237.5.' " (*People v. Buttram* (2003) 30 Cal.4th 773, 782.) "[W]here the terms of the plea agreement leave issues open for resolution by litigation, appellate claims arising within the scope of that litigation do not attack the validity of the plea, and thus do not require a certificate of probable cause." (*Id*. at p. 783.)

In this case, the parties agreed that Vo would be sentenced to six years in prison in exchange for his plea of no contest with the understanding that count 5, which appeared

[6] Penal Code section 1237.5 provides: "No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court."

to be invalid, *might* be dismissed by the district attorney prior to sentencing. As a result, the disposition of count 5 was an issue that was left open by the parties to be resolved prior to or--as it turned out--at the sentencing hearing. Since the instant appeal is based on the resolution of that issue, we find that no certificate of probable cause was required.

B. The trial court did not err in imposing sentence on count 5

Vo argues that he should not have been sentenced to 90 days in county jail on count 5 because a "[Penal Code] section 1385 dismissal is an act that runs in the immediate favor of a defendant by cutting off an action or part of an action against a defendant." The People counter that either the court reporter incorrectly transcribed what was said at the sentencing hearing or the DDA simply misspoke, and the record shows that everyone present understood that count 5 was to be amended to a misdemeanor. In addition, the People argue it is clear that the trial court did not intend to dismiss count 5, because it did not state any reasons for such a dismissal, as required by Penal Code section 1385, let alone direct that such reasons be entered into the minutes.

We agree that the reporter's transcript is unclear on this issue. At sentencing, the DDA moved to amend count 5 and, almost immediately thereafter said, "The People ask to dismiss at this time." The trial court, after inquiring whether or not defense counsel objected, said "then *that* will be granted." (Italics added.) What the trial court meant by the pronoun "that," which could refer to either the motion to amend or the request to dismiss, is the question we must resolve.

The clerk's transcript is also ambiguous on this point. For example, the minute order prepared in connection with the sentencing hearing indicates that count 5 was amended to a misdemeanor, but again cites subdivision (a) of section 11377, which is the subdivision under which Vo was originally (and improperly) charged, rather than subdivision (b)(2). However, the minute order makes no mention of a dismissal of any of the counts, nor does it list any reasons why one or more counts were dismissed by the court.

As a general rule, the trial court's oral pronouncement controls over a clerk's minute order. (*People v. Mesa* (1975) 14 Cal.3d 466, 471.) We cannot give effect to that rule in this case, because doing so would conflict directly with Penal Code section 1385, subdivision (a). That statute authorizes the trial court to dismiss an action "in the furtherance of justice," but the "reasons for the dismissal must be set forth in an order entered upon the minutes." (*Ibid.*)

"It is settled law that this provision [i.e., Penal Code section 1385] is mandatory and not merely directory." (*People v. Orin* (1975) 13 Cal.3d 937, 944 (*Orin*).) " 'The statement of reasons [for dismissal] is not merely directory, and neither trial nor appellate courts have authority to disregard the requirement. It is not enough that on review the reporter's transcript may show the trial court's motivation; the *minutes* must reflect the reason "so that all may know why this great power was exercised." ' [Citation.] The underlying purpose of this statutory requirement is 'to protect the public interest against improper or corrupt . . . dismissals' and to impose a purposeful restraint upon the exercise of judicial power ' "lest magistral discretion sweep away the government of laws." ' " (*Ibid.*) The reasons for the dismissal must be stated in the minutes in order to, among other things, "restrain judicial discretion and curb arbitrary action for undisclosed reasons and motives" and "enable the appellate court to determine whether discretion has been properly exercised." (*People v. McAlonan* (1972) 22 Cal.App.3d 982, 986.) The court's "failure to comply with the requirement of the statute that the reasons of the dismissal be set forth in the order is fatal and is alone sufficient to invalidate the dismissal." (*Orin, supra,* at p. 945.)

Even assuming that the trial court in this case did understand the DDA to be seeking a dismissal of count 5, rather than an amendment of the charge to a misdemeanor, and did intend to grant that request, it failed to set forth its reasons for doing so in the minute order. In fact, the minute order for the sentencing hearing does not memorialize a dismissal of count 5; instead, it notes that the count was "amended to"

a misdemeanor. There is nothing in either the reporter's transcript[7] or the clerk's transcript which documents the reasons the court may have had for exercising its power of dismissal under Penal Code section 1385. Consequently, an order of dismissal of count 5 would be invalid on this record.

Where possible, we will attempt to harmonize a record that is in conflict. (*People v. Smith* (1983) 33 Cal.3d 596, 599.) When the record is in conflict and cannot be harmonized, " 'that part of the record will prevail, which, because of its origin and nature or otherwise, is entitled to greater credence.' " (*Ibid*.) Here, we find that the indicia in the clerk's transcript are entitled to more credence and support the conclusion that the trial court intended to *amend* count 5 to a misdemeanor, rather than dismiss it.[8] That conclusion is based on the following: (1) at the sentencing hearing, Vo's defense counsel did not, as he had at the change of plea hearing, state that count 5 would be dismissed, but instead indicated his belief that count 5 had been reduced to a misdemeanor;[9] (2) the DDA moved to amend count 5 to a misdemeanor; (3) the trial court proceeded to impose a concurrent 90 day county jail sentence on count 5; and (4) the minute order notes that count 5 was amended to a misdemeanor.

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[7] Even if the reporter's transcript in this case did include a recitation by the trial court of valid reasons for dismissal, the dismissal would still be invalid unless those reasons were also placed in the minutes. (*People v. Superior Court* (*Flores*) (1989) 214 Cal.App.3d 127, 135-136.)

[8] Vo argues that count 5 must have been dismissed because the probation officer advised the trial court that its action "would strike Count 5 and it's [*sic*] 16 months concurrent term from the *prison* chart." (Italics added.) However, the probation officer's response is equally accurate if count 5 was amended from a felony to a misdemeanor, since a misdemeanor conviction cannot result in a *prison* sentence. (See Pen. Code, § 19 [misdemeanor punishable by imprisonment in county jail].)

[9] This shift in position creates the inference that, at some point between the change of plea hearing and sentencing, defense counsel and the district attorney had discussed the issue and come to an understanding that the charge would be reduced to a misdemeanor, not dismissed.

Against these factors, there is only: (1) the DDA's spontaneous (and somewhat puzzling) request to dismiss;[10] and (2) the trial court's subsequent, nonspecific statement that "*that* will be granted." (Italics added.) These factors are insufficient to support a conclusion that the trial court intended a dismissal of count 5, rather than its amendment to a misdemeanor.

Consequently, we find the trial court granted the motion to amend count 5 to a misdemeanor and thus did not err in imposing a concurrent 90 day county jail sentence on that charge.

[10] In their opening brief, the People suggest that either the court reporter mistakenly transcribed "dismiss" instead of "amend" or that the prosecutor simply misspoke. Given that the word "dismiss" sounds nothing like the word "amend," we are inclined to believe that the prosecutor simply misspoke.

III. DISPOSITION

The judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.